BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The District Court did not render a written opinion, but it adopted the findings of fact and conclusions of law of the Master (R. 288), which appear at R. 269-273. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 314-321) is reported in 133 Fed. (2nd) 889.

Jurisdiction.

The jurisdiction has been set forth in the petition.

Statement of the Case.

The facts are stated in the petition to which reference is here made.

Specifications of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred,

1. In failing to construe Section 1b of the Copyright Act so as to grant protection to non-dramatic works which contain neither plot nor dialogue.

2. In failing to hold that the exclusive right to dramatize conferred by Section 1b of the Copyright Act, includes the right to supply in the process of dramatization, a plot or dialogue.

3. In failing to hold that where a title of a copyrighted work is itself part of the copyrighted material of the work, such part so used as the title is protected under the Copyright Act.

4. In failing to hold that the exclusive right to dramatize a non-dramatic work, granted by Section 1b of the Copy-

right Act, includes protection of the title where such title is also part of the context of the book.

5. In applying principles of law applicable to the determination of infringement of the right to multiply copies under Section 1a to the determination of the question of infringement of the exclusive right to dramatize granted by Section 1b of the Copyright Act.

6. In separating the title of the copyrighted work from its context in determining the question of infringement by dramatization under Section 1b of the Copyright Act.

7. In holding as a matter of law or mixed questions of law and fact that defendant was not guilty of infringement or unfair competition.

8. In reversing the judgment of the District Court, which overruled defendant's objections to the Master's report, where such objections were not specific.

9. In failing to hold that the exclusive right to dramatize a non-dramatic work granted by Section 1b of the Copyright Act is protected under the law of unfair competition.

10. In holding that secondary meaning must be proved for a title not descriptive of the contents of the book, where such title had never been used before as the title for any other book, play or literary work.

Summary of Argument.

The points of argument follow in the main the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT.

I.

The Circuit Court of Appeals erred in construing Section 1b of the Copyright Act by denying the protection thereof to plaintiff's non-dramatic work because it did not contain story, plot or characters. The Act contains no such limitation.

The parts of Section 1 of the Copyright Act (17 U.S.C.A.) pertinent hereto are as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) to print, reprint, publish, copy and vend the copyrighted work;
>
> (b) * * * to dramatize it if it be a non-dramatic work; * * *"

It is apparent that the Circuit Court of Appeals, throughout its opinion, has placed a limitation on the word "non-dramatic" not warranted by the clear language of the Act, thus denying to plaintiff's non-dramatic work the protection of Section 1b.

Thus the Court says:

> "Here plaintiff's book could not be dramatized without being rewritten so thoroughly as to make it another book." (R. 319)
>
> "*A fortiori,* where, as in the instant case, the subject matter is completely abstract and where there are no characters, it seems to us that plaintiff has no valid claim of infringement." (R. 319)

"*Dam* v. *Kirk La Shelle,* 175 F. 902, merely holds that a plot may not be stolen without infringement. Here plaintiff's book has no plot." (R. 319)

"And the exclusive right to 'dramatize' it, which plaintiff protests was violated, would entail a complete re-writing, even to put it into form for a storyless newsreel or feature." (R. 319-320)

Since the Circuit Court of Appeals has said, "the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," (R. 321), it is apparent that the diametrically opposite findings of the District Court and the Circuit Court of Appeals result from the conflicting rules of law applied by them in making their comparisons of the book with the motion picture. It is of paramount importance, therefore, that these questions, never before presented to this Court, be settled.

If the exclusive right to dramatize a non-dramatic work is to be at all effective, then of necessity it must include the right to take whatever steps the author may deem necessary to convert his non-dramatic work into a dramatic work. To place a limitation on this right (as the Circuit Court of Appeals has done) because of the *degree* of change considered necessary to convert a copyrighted work into a dramatic work, is to read into the Act a limitation on the exclusive right granted therein, entirely unjustified by its clear language. Of course, the non-dramatic work has to be "rewritten" (R. 319-320) in order to dramatize it. To hold that the very steps necessary to effect such dramatization cannot be taken, is to nullify the valuable rights which the Act gives.

It is respectfully submitted that the plain language of Section 1b, which covers non-dramatic works without qualification as to type or character, entitles plaintiff's work to protection thereunder.

The modern development of the talking motion picture has made possible the use of the most widely diversified material for adaptation to the screen. Literary works without "plots" have been frequently adapted for motion pictures. The talking motion picture has, in fact, become a most important vehicle for public enlightenment, and there is virtually nothing that can be written which cannot be dramatized for motion picture purposes. Supplying "stories" or "plots" is by no means difficult.

The Circuit Court of Appeals has thus in effect held that the "story" features of defendant's motion picture, which are admittedly not found in plaintiff's book, constitute the differentiating factors which disprove the infringement. But if effect is to be given to Section 1b of the Act, then the right to dramatize of necessity includes the right to supply the very features, the lack of which is assigned by the Circuit Court of Appeals as a reason for denying relief to plaintiff. Thus again, the decision of the Court of Appeals nullifies the unqualified protection granted by Section 1b of the Act.

To hold that a motion picture company is not infringing when it dramatizes for an audience the combination of ideas copyrighted by another (by embodying those ideas in the experiences of specific characters by means of a "plot" or "story"), is to take away the exclusive right to dramatize granted by the Act to the copyright holder and to give it to the first infringer.

Since the case of *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (which construing the 1891 Act held that a motion picture could be a dramatization of a book), this Court has not construed Section 1b of the Copyright Act. None of the questions of construction involved herein were there discussed. It is respectfully submitted, therefore, because of the wide practice in modern times of adapting non-dramatic works to motion pictures, that the rules govern-

ing the protection to be accorded to authors should be settled by this Court.

The Circuit Court of Appeals in construing Section 1b of the Act, has applied the law relating to Section 1a. Section 1a covers the right to multiply copies. The right involved herein, viz., the exclusive right to dramatize granted by Section 1b calls for the application of different principles. Under Section 1a, the Court has before it two complete works, from a comparison of which *as written* it forms a conclusion. Under Section 1b, the Court has before it a copyrighted work, *not yet dramatized,* which it must compare with an alleged infringing *dramatic work.* It is obvious that the rules applicable to one cannot be applied to the other, for in determining the question of infringement by dramatization, it is apparent that the comparison between the alleged infringed work and the infringing work must be made in the light of a *dramatized version* of the infringed work and not in its form as copyrighted.

The basic question therefore under Section 1b is, "Has there been an interference with the right to dramatize?"

In discussing the distinction between the rights granted under Section 1a and 1b, Weil on Copyright (1917) (Sec. 1123, pp. 427, 428), says:

> "The right to dramatize is a more comprehensive one than the right to prevent unlawful copying * * * the right to make such changes, where requisite, is comprehended in the right of dramatization * * * Any substantial encroachment on such rights would be infringement."

The Circuit Court of Appeals held:

> "If we compare the two works, we find contrasts rather than similarities, and the resemblances, if any, between the subject matter of plaintiff's book and the picture are not important." (R. 318)

The Court goes on to explain as follows:

> "Plaintiff's book has no plot, while the motion picture is built on a plot which supplies much of the merit of the play. Plaintiff's book is written in essay form. The talking picture necessarily uses dialogue. Plaintiff's book has no sequence of incidents. The talking picture progresses from incident to incident in spinning out the story. Plaintiff's book deals with abstract economic ideas, whereas defendant's picture presents a romantic love story. Plaintiff's book has no characters while the movie shows warmly human characters who have distinctive individual traits, humorous or otherwise." (R. 318)

The Circuit Court of Appeals in the above quotations has obviously missed the point at issue, for all it has done is to point out the mechanical differences in *form* which necessarily exist between a dramatic work and a non-dramatic work of the type written by plaintiff. The "resemblances" to which the opinion refers are not discussed but are dismissed as "not important."

Similar misconstructions resulting from what amounts to a "verbatim" comparison by the Circuit Court of Appeals are found in the statement that no "concrete form" was copied (R. 316), (citing *Eichel* v. *Marcin*, 241 F. 404, 408, which involves Sec. 1a and not Sec. 1b), or that a comparison reveals no wrongful appropriation of "original thoughts and ideas," "central themes," or "material portions" of the book (R. 317), or that the resemblances between the book and the picture were limited to one single idea (R. 317). The Master and the District Court, however, made their comparisons with the motion picture from the viewpoint of a dramatization of plaintiff's book, and found that defendant's motion picture dramatized material portions thereof (R. 271, par. 17).

The Circuit Court of Appeals did not follow the liberal construction of the Copyright Act adopted by this Court.

The Constitution of the United States (Art. 1, Sec. 8, par. 8) gives Congress the power to secure to authors the exclusive right to their writings for a limited time. Pursuant to this power, Congress enacted Copyright Laws and from time to time has revised them, broadening the scope of the rights granted.

Construing the protection of copyright under the Act of 1891, this Court said, in *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291:

> "These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

The same case (p. 291) holds:

> "The foundation of all rights of this description is the natural dominion, which everyone has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others."

The Act of 1909, under which the instant case is brought, has been characterized by this Court in *Washington Co.* v. *Pearson*, 306 U. S. 30, 36 (involving the registration provisions of the Act), as follows:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements, 'to afford greater encouragement to the production of literary works of lasting benefit to the world.'"

It is respectfully submitted that the construction adopted by the Circuit Court of Appeals in the case at bar is completely at variance with the liberal policy of this Court and is so strict that the right of dramatization granted by Section 1b will be nullified in many cases, as it has been in the case at bar.

II.

The decision of the Circuit Court of Appeals is in conflict with Dam v. Kirk La Shelle, 175 Fed. 902, 907 (CCA 2). The absence of a plot is not a bar to the exercise of the exclusive right to dramatize granted by Section 1b of the Act.

A leading case on infringement by dramatization in which the Act is construed is *Dam* v. *Kirk La Shelle,* 175 Fed. 902, 907 (CCA 2). The Court there said:

> "But the right given to an author to dramatize his work includes the right to adapt it for representation upon the stage which must necessarily involve changes, additions, and omissions. * * * The statute giving authors of copyrighted works the exclusive right to dramatize them must receive a reasonably liberal application or it will be wholly ineffective. * * * Unless the copyright statute is broad enough to cover any adaptation which contains the plot or theme of the story, it is wholly ineffective."

The Circuit Court of Appeals rejected the authority of the above case because "here plaintiff's book has no plot" (R. 319), thus placing an entirely unwarranted limitation on Section 1b of the Act. (See Point I, this brief.)

In *Sheldon* v. *Metro Goldwyn Pictures Corp., et al.,* 81 F. 2nd 49, 55, 56 (C.C.A. 2 cert. den.), in discussing the

wide protection afforded by the Act against infringement in various guises, the Court says:

> "We have often decided that a play may be pirated without using the *dialogue* (citing cases). * * * it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning."

(Compare the above quotation with the following language in the opinion: "None of the scenes or *dialogue* were plagiarized from his book." (R. 318)) (Italics ours)

The fact that much of defendant's picture contains material not found in plaintiff's book is not a defense. In *Sheldon* v. *Metro-Goldwyn Pictures Corp., et al.,* 81 Fed. 2nd 49, 56, the Court said:

> "No plagarist can excuse his wrong by showing how much of his work he did not pirate."

III.

The title of a copyrighted work is protected under Sections 1b and 4 of the Copyright Act.

Section 4 of said Act, as amended (1909), reads as follows:

> "The works for which copyright may be secured under this title shall include *all of the writings** of an author." (Italics ours.)

The Circuit Court of Appeals in its decision cites several cases to the effect that "the copyright of a book or play does not give the copyright owner the exclusive right to the use of the title" (R. 316). These cases either antedate

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* The prior Act (Rev. Stat. of the U. S., Title 60, Chap. 3, Sec. 4952) confers copyright on the "book".

or incorrectly announce the law under the 1909 amendment of the Copyright Act now in force (see above).

It is respectfully submitted that since the title of a copyrighted work is just as much a part of the "writings" of an author as the remainder of such work, (in many cases involving literary effort) there is no reason why the Act does not protect such title to the same extent that it protects the remainder of the copyrighted material. This is particularly true in the case at bar, where the title is also part of the context of the book itself, was an original writing of the plaintiff, independently conceived, and had never been used before as the title for any other book, play or literary work (R. 67, Pltf's Ex. 2, a physical exhibit, pp. 9 and 216; R. 72, 270-(5)).

Weil on Copyright in discussing the protection of the title says (1917, P. 447, Sec. 1176):

> "How fair use may be made of a title is an open question, as various cases hold that there can be no copyright in a title separately from the work to which it refers. These cases are founded on statutes which conferred copyright upon *books*, and are, hence, deemed inapplicable under the present statute which covers 'original writings', whether books or not." (Italics ours.)

The Circuit Court of Appeals in holding that "neither the words nor the particular combination of words, 'We Who Are Young,' are unique" (R. 317), was under the apparent misapprehension that the Copyright Act, like the Patent Law, protects only that which is novel or unique. The Act contains no such requirement and the cases are to the contrary. *Sheldon* v. *Metro-Goldwyn Pictures Corp., et al.*, 81 Fed. 2nd 49, 53, 54 (citing *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249; *Gerlach-Barklow Co.* v. *Morris & Bendien, Inc.*, 23 F. (2nd) 159, 161.) (It is not contradicted that the title was independently conceived by plaintiff (R. 72).)

It is respectfully submitted that the federal question here discussed is of great importance to authors, for if the exclusive right to dramatize, granted by Section 1b, is to be effective, the Act must protect the title in protecting the work. Because of the changes necessarily involved in dramatization, the title is a strong identifying feature. If the protection of the title by the Act is denied to the copyright holder, then a title which has found favor in the eyes of a producer could be affixed to a motion picture before the copyright holder has an opportunity to avail himself of his right to dramatize. This right, by the terms of the Act, is exclusively the author's during the life of the copyright. In effect, such a failure of the Act to afford protection would nullify the exclusive right granted.

Treating the title as unprotected, the Circuit Court of Appeals, in determining the question of infringement by dramatization, failed to consider the context of plaintiff's book and the title as one inseparable whole.

The District Court found that the appropriation of plaintiff's identical title, in connection with other similarities, was "corroborative circumstantial evidence of access and copying" (R. 271, (16)), and concluded as a matter of law that:

> "The adoption by the infringing work of an identical title is a factor in determining whether there is an infringement, where other similarities exist." (R. 273, Par. 9)

This guiding rule is a sequitur if Section 4 protects the title. It is respectfully submitted that the District Court correctly announced the law.

IV.

The exclusive right to dramatize granted by the Copyright Act is entitled to protection under the law of unfair competition.

The Circuit Court of Appeals held:

> "Since we can see no grounds for confusion of plaintiff's general economic discussion with defendant's romatic love story, we conclude that there was no unfair competition." (R. 321)

In treating with the works *as written*, the Circuit Court of Appeals erred because it failed to consider the plaintiff's right to dramatize his book for motion pictures. The Copyright Act, giving plaintiff the exclusive right to dramatize his non-dramatic work, created a right in being which was as much entitled to protection from unfair competition as, for example, the right to the use of a trade name or trade mark. This right was not dependent on the volume of sales, nor on the memory of the public, as the Circuit Court of Appeals held (R. 320), but was valid and subsisting for the life of the copyright.

The above view is supported in *Ladas*: *International Protection of Literary and Artistic Property* (Harvard Studies in International Law III) (1938) Vol. 2, Sec. 343 at pp. 738 and 739:

> "In view of the fact that modern theory of unfair competition in general is broader than in the past, this [actual competition] should not be insisted upon, especially in view of the fact that the modes of reproduction of a successful work at the present time are quite numerous and there is a potential market which authors have an interest in protecting. Thus the author may contemplate cinematographic reproduction and the use of its title by others for a film may prejudice the salability of his story."

See *International Service Co.* v. *Associated Producers,* 273 Fed. 585, 587, and *Patten* v. *Superior Talking Pictures,* 8 Fed. Supp. 196, 197.

In Frohlich & Schwartz on *The Law of Motion Pictures* (1918) p. 434, the author points out that under the Copyright Act the owner has the sole and exclusive right to dramatize; that a stranger who puts out a motion picture under the same title is anticipating the right given to the copyright owner who, when he attempts dramatization, is faced with the dilemma that if he uses the title he has conceived, he is unfairly competing with the stranger who has prior use of the title for a motion picture.

We do not believe that this Court will approve as "fair competition", such an interference with the exclusive right to dramatize.

The precise question here involved, viz. the protection of the Federal right (exclusive right to dramatize) under the law of unfair competition, has not been decided by the courts in Illinois or by this Court. However, since every state protects against unfair competition, the decision of the Circuit Court of Appeals is probably in conflict with the state law, as yet unannounced by the highest court therein, in that it fails to recognize and protect an important right granted by a Federal Act.

* * *

The decision of the Circuit Court of Appeals, that a title must attain secondary significance before any property rights in it can be protected, is in conflict with the applicable decisions of this Court.

The title of plaintiff's book is not descriptive of its contents and under such circumstances, no secondary meaning need be proved for it. This Court held in *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 256, that the trademark, "The American Girl," as applied to shoes

is neither geographical nor descriptive of its product. This Court said:

> "Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected * * *" (p. 256).

See also *Gannert* v. *Rupert,* 127 F. 962, 963, where the title "Comfort" was held not to be descriptive of a magazine. (Compare opinion of Circuit Court of Appeals (R. 317), holding that the words, "We Who Are Young," "are merely a descriptive phrase in the English language * * *".)

CONCLUSION.

From the foregoing, it appears that the Circuit Court of Appeals for the Seventh Circuit has now rendered a decision in conflict with the controlling and applicable decisions of this Court, in conflict with applicable decisions of other Circuit Courts of Appeal, in a case of great importance to authors and the public generally, and which decision has seriously prejudiced the rights of petitioner.

Respectfully submitted,

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